Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 19, 1993

Mr. Donald G. Vandiver
First Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR93-540

Dear Mr. Vandiver:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 19757.

The City of Lubbock (the "city") has received a request for bid proposals for a public transportation system received pursuant to Request for Proposals ("RFP") No. 12471. Specifically, the requestor seeks "copies of all proposals submitted to [the city] for Transportation Management Services along with any related material submitted for this [proposal].[1] You claim the requested information is excepted from public disclosure under sections 3(a)(4) and 3(a)(10) of the Open Records Act.

Section 3(a)(4) excepts "information which, if released, would give advantage to competitors or bidders." The purpose of section 3(a)(4) is to protect the governmental body's interests in relation to competition for a contract or benefit. Open Records Decision No. 592 (1991) at 8. It does not protect the interests of private parties. *Id.* at 9. A governmental body must make a specific showing of potential harm in a particular competitive situation. Open Records Decision No. 541 (1990). Section 3(a)(4) is generally inapplicable when the bidding on a contract has been completed. Open Records Decision No. 541 (1990) at 5.

[1]The request for information from the city also seeks "the evaluation results and criteria used in the evaluation process." Because you have raised no exceptions concerning the evaluation criteria for RFP No. 12471 from the city's office of purchasing, the city must release this information to the requestor if it has not already done so.

The city informed this office by telephone on July 19, 1993, that the bidding has been completed. You do not make any specific arguments on how the release of this information may harm the interests of the city. Because you have not met your burden to show potential harm in a particular competitive situation, the city may not withhold the requested information under section 3(a)(4).

Section 3(a)(10) excepts "trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757 (1939). *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). A trade secret

> may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). The Restatement lists six factors that should be considered when determining whether information is a trade secret:

> (1) the extent to which the information is known outside of [the company's] business; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and to [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. This office must accept a third party's claim for exception as valid if a *prima facie* case is made that the information in question constitutes a trade secret and if no argument

is made that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990) at 5. The city has made no determination concerning the applicability of section 3(a)(10) to the requested information. Accordingly, we must accept the third party's claim for exception as long as a *prima facie* case is made. *Id.*

The city received proposals from ATC/VANCOM, Inc. and McDonald Transit Associates, Inc. in response to RFP No. 12471. By letter dated April 28, 1993, this office notified ATC/VANCOM, Inc. of the request and offered the company the opportunity to submit a brief supporting the city's 3(a)(10) claim. ATC/VANCOM has not done so. When an agency or company fails to provide relevant information regarding the factors necessary to make a 3(a)(10) claim, a governmental body has no basis for withholding information under section 3(a)(10). Open Records Decision Nos. 405 (1984); 402 (1983). Accordingly, the city may not withhold under section 3(a)(10) the information ATC/VANCOM, Inc. submitted to the city.

McDonald Transit Associates did submit a brief. The company claims that the information in sections A, D, E, G, and Appendix A of the proposal are trade secrets. Specifically, the company claims that the methodology contained in its bid proposal has been developed over 21 years of transit management experience and through the expenditure of a great deal of money. The company claims that the information is invaluable in gaining an advantage over its competitors and that the information would be virtually impossible for competitors to obtain. The company also states that the information contained in the proposal is known only to management employees of the company who have signed noncompetition, nondisclosure contracts with the company.

Sections B and C contain information about the general manager and the support staff. The company did not make any specific claims as to why this information would be considered a trade secret. Section 3(a)(10) generally does not except resumes and listings of educational and work experience for employees of a private company. Open Records Decision No. 306 (1982). Because the company has not met its burden to make a *prima facie* case for Sections B and C, they may not be withheld under section 3(a)(10).

Section E contains two parts: a list of achievements in the transit industry and a list of financial references. The company has not raised any specific claims concerning the list of achievements in the transit industry and has not demonstrated a *prima facie* case that the information would constitute a trade secret as defined by the Restatement. The city may not, therefore, withhold under section 3(a)(10) the list of achievements in the transit industry for McDonald Transit Associates, Inc.

The other list contained in the proposal as section E is a list of financial references. The company argues that the list in conjunction with Appendix A, containing a detailed financial statement and the financial methodology of the company, is proprietary financial information. The company has not demonstrated a *prima facie* case that the list of financial references constitutes a trade secret or financial information under section 3(a)(10). Accordingly, the city may not withhold the financial references of section E under section 3(a)(10) of the Open Records Act. However, Appendix A is a very detailed report of the company's financial standings as well as their methodology for handling the company's finances. Because the information is so highly prized by the company, disclosure could impair the city's ability to obtain the information in the future. *See* Open Records Decision No. 541 (1990) at 13 (section 3(a)(10) excepts commercial and financial information from disclosure if (1) disclosure would impair the governmental body's ability to obtain necessary information in the future or (2) disclosure would substantially harm the competitive position of the company from which the information was obtained). Accordingly, the city may withhold Appendix A from disclosure under section 3(a)(10).

Sections A and D contain marketing schemes and management methodology that meets the definition of a trade secret as set out by the Restatement. RESTATEMENT OF TORTS § 757 cmt. b (1939) (trade secret may relate to the sale of goods or to other operations in the business, or a list of specialized customers, or a method of office management). Because the company has made a *prima facie* case, the city may withhold sections A and D from required public disclosure under section 3(a)(10). Because the bid proposal is closed, however, the city may not withhold section G, containing the fee proposal of the company, under section 3(a)(4) or 3(a)(10). Open Records Decision No. 319 (1982) (pricing proposals may be withheld only during the bid submission process).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,

Kymberly K. Oltrogge
Assistant Attorney General
Open Government Section

KKO/LBC/jmn

Ref.: ID# 19757

Enclosures: Submitted documents

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(w/o enclosures)